

## PRESERVING CONSTITUTIONAL FREEDOMS IN TIMES OF NATIONAL CRISIS

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### INTRODUCTION

Following the terrorist attacks of 9/11, the Bush Administration acted unilaterally on many fronts. It created military tribunals to try suspected terrorists, held individuals indefinitely without charges or trial, engaged in warrantless surveillance, and sent suspects to other countries for interrogation and torture. Constitutional rights and privileges were withdrawn for many citizens and aliens. Customary and fundamental checks and balances disappeared. Military commissions became a substitute for prosecution through civil courts or courts-martial. As has happened before, the United States responded to an emergency by violating basic principles of constitutional government, inflicting injuries on many innocent individuals and damaging its reputation around the world.<sup>1</sup>

What has the United States learned from previous times of crisis? How often has a concentration of power in the presidency led not to safety for its citizens, but to abuses of individual rights and a weakening of national security? It may be tempting to think that citizens are adequately protected by the Bill of Rights and an independent judiciary. The framers did not believe that. They put their trust in structural protections: separation of powers and the system of checks and balances. Officials with political power, they understood, are apt to misuse it. James Madison explained that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”<sup>2</sup>

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1. *See generally* LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS, at xiii (2008) (discussing America’s freedoms in the post-9/11 era) [hereinafter THE CONSTITUTION AND 9/11].

2. THE FEDERALIST No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 2002).

## I. DEPENDING ON STRUCTURE

The framers understood that putting safeguards on paper is not enough. A written allocation of powers among three branches can easily become mere “parchment barriers.”<sup>3</sup> It is not difficult to write a constitution that establishes a judicial branch and spells out various rights and privileges for citizens. However, unless the government is structured to preserve judicial independence and individual freedoms, those values may exist only on paper. Public officials and citizens in the private sector must understand and embrace the need for dispersing political power.

Many countries have adopted constitutions that provide for three branches of government. They stipulate individual rights only to find that in practice, the constitutional provisions mean nothing, and power consolidates in one place, usually under a strong executive body. The 1936 Soviet Constitution stated that “[a]ll power in the USSR belongs to the working people” and spoke of “the dictatorship of the proletariat” as “the political foundation of the USSR.”<sup>4</sup> The 1977 Soviet Constitution provided: “All power in the USSR belongs to the people.”<sup>5</sup> Both Constitutions “guaranteed” freedom of speech, freedom of the press, freedom of assembly and of meetings, and freedom of street marches and demonstrations.<sup>6</sup>

In offering protections to individual liberties, the Soviet Constitution looked promising on paper. In practice the rights were nonexistent. In large part that was because of structure. Although formally recognizing the power of the people, the Communist Party was “the leading and guiding force of Soviet society and the nucleus of its political system.”<sup>7</sup> Also, the human rights identified in the 1936 and 1977 Constitutions were not principally for the individual. The purpose of those rights was “to strengthen the socialist system.”<sup>8</sup> The superiority of the state over the individual is emphasized in

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3. See THE FEDERALIST No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 2002) (“Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?”).

4. Konstitutsiia SSSR (1936) [Konst. SSSR] [USSR Constitution] arts. 2, 3, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS 76 (F.J.M. Feldbrugge ed., F.J.M. Feldbrugge & William B. Simons, trans., 1979).

5. Konstitutsiia SSSR (1977) art. 2, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS, *supra* note 4, at 77.

6. Konstitutsiia SSSR (1936) art. 125, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS, *supra* note 4, at 100; Konstitutsiia SSSR (1977) art. 50, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS, *supra* note 4, at 101.

7. Konstitutsiia SSSR (1977) art. 6, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS, *supra* note 4, at 77.

8. Compare Konstitutsiia SSSR (1936) art. 125, with Konstitutsiia SSSR (1977) [USSR Constitution] art. 50, in THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS, *supra* note 4, at 100–01.

several articles of the Soviet Constitution. In exercising their rights and freedoms, “citizens may not injure the interests of society and the state or the rights of other citizens.”<sup>9</sup> Citizens have the right to unite in social organizations “[i]n accordance with the goals of communist construction.”<sup>10</sup> The primary value was the state, not the individual.

In a 1953 dissent, Justice Robert Jackson underscored the importance not of written constitutions, but of the customs and procedures that give life to rights and liberties.<sup>11</sup> He remarked: “Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.”<sup>12</sup> Identifying freedoms in a constitution is not sufficient. Individuals have a right to be protected by an independent court, “to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one’s behalf.”<sup>13</sup> These procedures are “especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed.”<sup>14</sup>

From 1789 to the present, especially in times of crisis, the United States has routinely neglected the essential dependence of constitutional government on separation of powers and checks and balances. At such times, the urge is great to defend and safeguard the nation at the cost of individual liberties. The priority moves from individual freedom to the national interest, but at what point does dedication to the nation undermine the Constitution and personal liberty?

## II. CHAMPIONING “NATIONAL SECURITY”

In the name of “national security,” the government often insists that a response to grave and immediate threats requires it to place limitations on individual rights and freedoms. Citizens are assured that the restrictions are temporary and will be restored when the threats recede. In a dissenting opinion in 1950, Justice Jackson cautioned: “Security is like liberty in that many are the crimes committed in its name.”<sup>15</sup> Justice Black, in the 1971 *Pentagon Papers Case*, warned that the word security is a “vague

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9. Konstitutsiia SSSR (1977) art. 39, in *THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS*, *supra* note 4, at 95.

10. Konstitutsiia SSSR (1977) art. 51, in *THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS*, *supra* note 4, at 101.

11. *Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

12. *Id.*

13. *Id.* at 225.

14. *Id.*

15. *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

generality” that can be readily invoked to subordinate individual rights to the ambitions of government: “The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”<sup>16</sup>

Faced with an emergency, the United States may decide to elevate the “national interest” as the overriding priority. Members of Congress may be advised to forego their local interests to promote the national interest, with the President supposedly best positioned to advance the larger objective. But what is the “national interest”? If we can ever define it, is it invariably attractive and worth trumping other values? Soviet Russia thought it was in its national interest to spread Communism worldwide.<sup>17</sup> Officials of Nazi Germany decided it was in the national interest to take Sudentenland, Czechoslovakia, Poland, and the rest of Europe. President Lyndon B. Johnson told the country in 1964 that intervention in Southeast Asia was in the national interest and urged Congress to pass the Gulf of Tonkin Resolution with minimal debate.<sup>18</sup> In a country dominated by the national interest, minorities and the politics of pluralism are given short shrift. Power is concentrated. Personal liberties and rights can be easily marginalized to advance what some government authorities decide is the national interest.

Promoting the national interest is a time-tested method of pushing aside the institutional checks and political deliberation that are essential to democratic government. J. David Singer explained that the national interest becomes:

[A] smokescreen by which we all too often oversimplify the world, denigrate our rivals, enthrall our citizens, and justify acts of dubious morality and efficacy. . . . When that hoary concept of “the national interest” is invoked, products of such a culture—and the educational structure that spawns them—snap to attention, do their duty, and turn off their ethical and intellectual equipment.<sup>19</sup>

Some argue that the President is elected by the entire country and members of Congress are elected only by state and congressional districts.

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16. *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 719 (1971).

17. DONALD E. NUECHTERLEIN, NATIONAL INTERESTS AND PRESIDENTIAL LEADERSHIP: THE SETTING OF PRIORITIES 2 (1978).

18. LOUIS FISHER, PRESIDENTIAL WAR POWER 129–35 (2d ed. 2004) [hereinafter PRESIDENTIAL WAR POWER].

19. W. DAVID CLINTON, THE TWO FACES OF NATIONAL INTEREST, at x (1994) (citation omitted).

Why would that electoral fact give the President a superior capacity to define the national interest? There is nothing automatically negative about local interests, just as there is nothing intuitively positive about the national interest.

What makes the President better able to represent the national interest than Congress? That was never the position of the framers. They put their trust in checks and balances (including impeachment), periodic elections, and the deliberative process of debating and deciding national policy. They rejected any thought of giving the President the authority to take the country from a state of peace to a state of war. In *Federalist No. 4*, John Jay said that single executives “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”<sup>20</sup> The result was a rush “to engage in wars not sanctified by justice or the voice and interests of his people.”<sup>21</sup>

### III. FREE SPEECH IN TIME OF WAR

During the first decade of the new national government created at the Philadelphia Convention, our earliest statesmen debated how to balance individual liberties and government authority. In 1792, Congress passed legislation to establish a uniform militia drawn from the various states.<sup>22</sup> It would have the capacity to suppress insurrections and repel invasions.<sup>23</sup> To curb executive abuse, Abraham Baldwin offered an amendment to provide that information of any insurrection shall be communicated to the President by either a Justice of the Supreme Court or by a district judge.<sup>24</sup> Executive power would thus be limited by judicial determinations. Baldwin’s proposal was accepted.<sup>25</sup>

President George Washington complied with this legislation when he called up the militia in 1794 to put down the Whiskey Rebellion.<sup>26</sup> Justice James Wilson certified that Pennsylvania lacked the capacity to deal with the rebellion.<sup>27</sup> Yet Washington remained highly critical of citizens who met in groups to discuss politics. He directed his ire at those who joined

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20. THE FEDERALIST No. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 2002).

21. *Id.*

22. 1 Stat. 264 § 1 (1792).

23. *Id.*

24. 3 ANNALS OF CONG. 577 (1792).

25. *Id.*; 1 Stat. 264 § 2 (1792).

26. George Washington. A Proclamation (Aug. 17, 1794), *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789—1897, at 160 (James D. Richardson ed., 1896).

27. *Id.*

these organizations and discussed public policy. George Washington asked, “[C]an any thing be more absurd, more arrogant, or more pernicious to the peace of Society, than for self created bodies, forming themselves into *permanent* Censors, and under the shade of Night in a conclave,” offering judgments that statutes passed by Congress were mischievous or unconstitutional?<sup>28</sup> Washington recognized that citizens had the right under the Constitution to petition government, but he did not want citizens meeting in political clubs to critique his policies.<sup>29</sup>

Washington used his Sixth Annual Address to Congress, issued on November 19, 1794, to urge congressional unity “to turn the machinations of the wicked to the confirming of our constitution: to enable us at all times to root out internal sedition, and put invasion to flight.”<sup>30</sup> In short, those who felt at liberty to meet and criticize government were to be muzzled. The Senate quickly came to Washington’s support.<sup>31</sup> The House chose to spend five days carefully debating his message, refusing to offer a blanket endorsement for Washington’s position. During the debate, James Madison remarked: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”<sup>32</sup>

What Madison and other lawmakers tried to avert finally took shape with the Alien and Sedition Acts of 1798. Fines and jail sentences awaited anyone (citizens or aliens) who wrote or said anything about Congress or the President that (1) was deemed to be “false, scandalous and malicious,” (2) had the intent to “defame” those political institutions or bring them into “contempt or disrepute,” (3) “excite” any hatred against them, or (4) “stir up sedition” or act in combination to oppose or resist federal laws or any presidential act to implement those laws.<sup>33</sup> Any criticism of government, any misgiving, any question, distrust, or skepticism, could be grounds for bringing someone into court and convicting them. Self-government became government against the sovereign people. People did not censure government; government censured people. The Sedition Act continued in

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28. Letter from George Washington to Burges Ball (Sept. 25, 1794), in 33 THE WRITINGS OF GEORGE WASHINGTON 506 (John C. Fitzpatrick ed., 1940).

29. THE CONSTITUTION AND 9/11, *supra* note 1, at 66-68.

30. George Washington, Sixth Annual Address to Congress (Nov. 19, 1794), in 34 THE WRITINGS OF GEORGE WASHINGTON 37 (John C. Fitzpatrick ed., 1939).

31. John Adams, Address of the Senate to George Washington, President of the United States (Nov. 21, 1794), reprinted in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 26, at 168-69. For an excellent analysis of the political clubs that formed in the 1790s, see EUGENE PERRY LINK, DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800 (1942).

32. 4 ANNALS OF CONG. 934 (1794).

33. Alien and Sedition Acts of 1798, ch. 74, § 2, 1 Stat. 596 (repealed 1801).

force until March 3, 1801, when it expired of its own terms.

After America entered World War I, a number of states enacted their own sedition laws in 1917. Joseph Gilbert was prosecuted and sentenced under a Minnesota law for commenting: “[W]e were stampeded into this war by newspaper rot to pull England’s chestnuts out of the fire.”<sup>34</sup> Congress looked at these state statutes as models and passed its own sedition law a year later.<sup>35</sup> Initially, the Supreme Court supported the government’s effort to punish critics of the war. Circulars opposing the recruiting and enlistment of U.S. soldiers were considered, in the words of Justice Oliver Wendell Holmes, Jr., “a clear and present danger.”<sup>36</sup> Even a “tendency” to oppose the war effort could constitute harm under the statute.<sup>37</sup>

Professor Zechariah Chafee Jr. objected to Holmes’s reasoning. In an article in the *Harvard Law Review* in June 1919, Chafee defended the right of citizens to criticize government not only in time of peace but especially in time of war and emergency conditions.<sup>38</sup> He argued that the First Amendment declared a national policy that favored broad “discussion of all public questions.”<sup>39</sup> Congress should take care not to restrict what citizens said or wrote.<sup>40</sup> The First Amendment did more than protect an individual’s interest in speaking out. Equally important, it protected society’s interest in hearing criticism on the commitment of military force and listening to impassioned debate that challenged government.<sup>41</sup> Such criticism is not seditious; it is a citizen’s duty.

Chafee explained the value of full public debate in time of war. Even after the government had declared war and decided on military action:

[T]here is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly

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34. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 211 (2004) (quoting *Gilbert v. Minnesota*, 254 U.S. 325, 327 (1920)).

35. Act of May 16, 1918, ch. 75, 40 Stat. 553 (1918).

36. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

37. *Id.* at 51–52; see *Debs v. United States*, 249 U.S. 211, 216 (1919) (explaining that the legal standard of whether the defendant’s words had a “natural tendency” to obstruct a recruiting service was properly submitted to a jury).

38. Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932, 958 (1919).

39. *Id.* at 934.

40. *Id.*

41. *Id.* at 958.

defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished.<sup>42</sup>

As demonstrated in litigation, “an opponent makes the best cross-examiner” and for that reason, “it is a disastrous mistake to limit criticism to those who favor the war.”<sup>43</sup>

Chafee’s article had an impact on Holmes, who dissented in a 1919 case that upheld the convictions of individuals who advocated that workers not produce war materials, objected to U.S. involvement in the war, encouraged resistance, and advocated a general strike.<sup>44</sup> Holmes moved away from the “bad tendency” test to a clear-and-present-danger standard.<sup>45</sup> He found nothing in the leaflets distributed by the defendants to create an immediate danger to the war aims of the government. He objected to punishing individuals who “had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.”<sup>46</sup> Holmes relied on the theme of social costs that Chafee had developed:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>47</sup>

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42. *Id.*

43. *Id.*

44. *Abrams v. United States*, 250 U.S. 616, 617 (1919).

45. *See id.* at 628 (Holmes, J., dissenting) (“It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.”)

46. *Id.* at 629.

47. *Id.* at 630.

## IV. THE THREAT OF “INHERENT” POWER

In times of crisis, presidents have often cited “inherent” powers in an attempt to legitimate their actions. The Constitution is protected when the branches of government operate on the basis of express and implied powers. Express powers are clearly stated in the text of the Constitution; implied powers are those that can be reasonably drawn from express powers. “Inherent” is sometimes used as synonymous with “implied,” but the two terms are radically different. Inherent power has been defined in this manner: “An authority possessed without its being derived from another. . . . [P]owers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”<sup>48</sup> That definition, which remained in the sixth edition of *Black’s Law Dictionary* (1990), dropped out of the current eighth edition (2004), which contains this definition of inherent power: “A power that necessarily derives from an office, position, or status.”<sup>49</sup>

The purpose of a constitution is to specify and confine government powers to protect individual rights and liberties. That objective is undermined by claims of open-ended authority that are not easily defined or justified and can be asserted as “exclusive” and therefore not subject to checks and balances from other branches. The assertion of “inherent” authority ushers in a range of vague and abstruse powers. What “inheres” in the President? The standard collegiate dictionary explains that “inherent” describes the “essential character of something: belonging by nature or habit.”<sup>50</sup> How do we know what is essential or part of nature? The dictionary cross-references to “intrinsic,” which can mean within a body or organ (as distinct from extrinsic) but also something “belonging to the essential nature or constitution of a thing,” such as the “intrinsic worth of a gem” or the “intrinsic brightness of a star.”<sup>51</sup> Words like inherent, essential, nature, and intrinsic are so nebulous that they invite political abuse and endanger individual liberties.

The adjective *inherent* can introduce other properties that threaten constitutional government, including attributes that suggest superiority, exclusivity, and endurance. The verb *inhere* is used to describe “a fixed element,” such as the belief that “all virtue *inhered* in the farmer” or the “the excellence *inhering* in the democratic faith.”<sup>52</sup> The noun *inherence*

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48. BLACK’S LAW DICTIONARY 703 (5th ed. 1979).

49. BLACK’S LAW DICTIONARY 1208 (8th ed. 2004).

50. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 601 (10th ed. 1993).

51. *Id.* at 614.

52. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1977).

may imply a power that has “permanent existence as an attribute.”<sup>53</sup> *Inherent* is associated with a quality that is settled or established as “belonging by nature or settled habit.”<sup>54</sup> Claims of permanent, exclusive, and plenary presidential powers have often been asserted and beaten back by other branches.

In June 1950, President Harry Truman sent U.S. troops to South Korea without seeking authority from Congress.<sup>55</sup> His action violated the Constitution, the legislative history of the U.N. Charter, and the U.N. Participation Act of 1945, all of which required the President to come to Congress first and obtain legislative authority before venturing into foreign wars with the United Nations.<sup>56</sup> He even violated his own pledge to the Senate when it debated the U.N. Charter. He stated that when any agreements are negotiated to participate in a U.N. military action, “it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>57</sup>

Two years later Truman invoked inherent power to seize steel mills in order to prosecute the war in Korea. A hearing for a preliminary injunction followed, and the district court judge asked the attorney handling the case for the Justice Department whether the courts could never review a presidential determination that an emergency exists.<sup>58</sup> The Government attorney responded, “[t]hat is correct.”<sup>59</sup> In a blistering opinion, the district judge repudiated the theory of emergency and inherent power, warning that the administration’s theory “spells a form of government alien to our Constitutional government of limited powers.”<sup>60</sup> The Supreme Court, 6 to 3, affirmed the ruling of the district court.<sup>61</sup>

In 1971, officials of the Nixon Administration asserted an inherent right not to spend funds appropriated by Congress.<sup>62</sup> President Richard Nixon claimed that the constitutional right to impound funds to combat inflation or avoid a tax increase was “absolutely clear.”<sup>63</sup> The Deputy Attorney General testified that impoundment was consistent with the

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53. *Id.*

54. *Id.*

55. PRESIDENTIAL WAR POWER, *supra* note 18, at 81.

56. *Id.* at 81–104.

57. *Id.* at 91.

58. H.R. DOC. NO. 32-534, pt. 1, at 371–72 (1952).

59. *Id.* at 372.

60. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C. 1952), *aff’d*, 343 U.S. 579 (1952).

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589, 667 (1952).

62. *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 92d Cong. 98 (1971) (statement of Casper W. Weinberger, Deputy Director, Office of Management & Budget).

63. Richard Nixon, The President’s News Conference, PUB. PAPERS 53, 62 (Jan. 31, 1973).

President's constitutional duty to "take care that the laws shall be faithfully executed" and was sanctioned by the constitutional provision that vests the "executive power" in the President.<sup>64</sup> This official insisted that any effort by Congress to impose statutory restrictions on impoundment would interfere with the President's "inherent powers under the Constitution as it relates to national defense and foreign affairs."<sup>65</sup> Almost every court in which this issue was litigated rejected the administration's theory of inherent power not to spend appropriated funds, and in 1974 Congress passed legislation to limit the President's power over impoundment.<sup>66</sup>

President Nixon claimed inherent authority to conduct warrantless surveillance within the United States, including against critics of the war in Vietnam. A district court rejected the administration's argument that the Attorney General, "as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security."<sup>67</sup> The court expressly rejected the claim of "inherent" presidential power.<sup>68</sup> The district court's decision was upheld by the Sixth Circuit, which examined and rejected the government's claim that "[t]he power at issue in [the] case is the inherent power of the President to safeguard the security of the nation."<sup>69</sup> A unanimous ruling by the Supreme Court affirmed the Sixth Circuit.<sup>70</sup> Following extensive hearings, Congress passed the Foreign Intelligence Surveillance Act (FISA) of 1978<sup>71</sup> to establish the "exclusive means" for national security surveillance, clearly rejecting inherent presidential power in favor of statutory constraints.<sup>72</sup>

In the immediate aftermath of the 9/11 terrorist attacks, President George W. Bush turned to inherent powers to authorize military tribunals, designate U.S. citizens as "enemy combatants" to be held indefinitely without trial, send suspects abroad to countries that practice torture (extraordinary rendition), and authorize warrantless eavesdropping by the

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64. *Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Comm. on Government Operations and the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 93d Cong. 369 (1973) (statement of Joseph T. Sneed, Deputy Att'y Gen. of the United States).

65. *Id.* at 387.

66. LOUIS FISHER, PRESIDENTIAL SPENDING POWER 189–92, 198–201 (1975).

67. *United States v. Sinclair*, 321 F. Supp. 1074, 1076 (E.D. Mich. 1971).

68. *Id.* at 1077.

69. *United States v. U.S. Dist. Ct. for the E. Dist. of Mich.*, 444 F.2d 651, 658 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972).

70. *United States v. U.S. Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 299 (1972).

71. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 and 18 U.S.C.).

72. 18 U.S.C. § 2511(f) (2006); THE CONSTITUTION AND 9/11, *supra* note 1, at 290–91.

National Security Agency (NSA), in defiance of the FISA statute of 1978.<sup>73</sup> In 2006, the Supreme Court expressly rejected the administration's argument that President Bush possessed inherent authority to create military tribunals,<sup>74</sup> forcing the administration to seek statutory support from Congress.<sup>75</sup>

The difficulty in comprehending the source and limits of inherent power poses serious risks to constitutional government. The claim and exercise of inherent powers move a nation from one of limited powers to boundless and ill-defined authority. The assertion of inherent power in the President threatens to displace the doctrine of separation of powers and the system of checks and balances. Sovereignty moves from the constitutional principles of self-government, popular control, and republican government to largely unchecked power in the White House.

#### V. MISGUIDED JUDICIAL RULINGS

Three Supreme Court decisions have magnified presidential power in national security. The first, involving the "sole organ" doctrine, reflects not only dicta prepared by the Court, but serious misconceptions that continue to confuse and distort the scope of executive authority. The second, concerning Nazi saboteurs in 1942, was cited by the Bush Administration after 9/11 to justify military tribunals. However, the 1942 decision reflected poorly on the Court and the Roosevelt Administration. Both branches later recognized their misjudgments. The third Supreme Court decision, recognizing the "state secrets privilege," resulted from the executive branch seriously misleading the Supreme Court on the content of a disputed document.

##### A. The "Sole Organ" Doctrine

Broad and unjustified interpretations of presidential power in the field of national security owe much to *United States v. Curtiss-Wright*, a Supreme Court case decided in 1936.<sup>76</sup> Writing for the Court, Justice Sutherland explained the power to oversee foreign affairs as:

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73. For Bush's military order authorizing the creation of military tribunals, see Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57,835 (Nov. 16, 2001). For background on military tribunals, NSA surveillance, and extraordinary rendition, see THE CONSTITUTION AND 9/11, *supra* note 1, at 285–360.

74. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–95 (2006).

75. THE CONSTITUTION AND 9/11, *supra* note 1, at 239–42.

76. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.<sup>77</sup>

Those who cite the sole-organ doctrine ignore the qualification at the end of this sentence and focus instead on the “plenary and exclusive” power of the President that exists apart from power delegated by Congress. Sutherland’s claim appears to have extra gravity because the individual who spoke about the sole-organ doctrine was John Marshall during his service with the U.S. House of Representatives in 1800. The next year Marshall would ascend to the position of Chief Justice of the Supreme Court and remain there until 1835.

First, nothing in Marshall’s speech stands for the belief that the President is the sole policy-maker in foreign affairs and national security. Such a position would be untenable, particularly coming from such a careful analyst as John Marshall. He knew that Article I of the Constitution expressly vests in Congress the power over foreign commerce as well as other powers related to external affairs—including naturalization, defining and punishing piracies and felonies committed on the high seas, defining and punishing offenses against the law of nations, declaring war, granting letters of marque and reprisal, and making rules concerning captures on land and water. Marshall never held that the President is the exclusive policy-maker in external affairs, neither when he was a member of the House, nor as Secretary of State, nor as Chief Justice.

Second, the dispute in *Curtiss-Wright* had nothing to do with independent or exclusive presidential power. The issue was solely one of legislative power. In 1935, the Supreme Court struck down a delegation of congressional power affecting domestic policy.<sup>78</sup> A year later, with *Curtiss-Wright*, the issue was whether the nondelegation doctrine applied differently to the field of international affairs. Congress, in 1934,

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77. *Id.* at 320.

78. See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) (declaring as unconstitutional the “Live Poultry Code” for New York City as authorized by the President under the National Industrial Recovery Act); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432–35 (1935) (declaring as unconstitutional a provision of the National Industrial Recovery Act authorizing the President to prohibit the transportation of petroleum in interstate and foreign commerce in excess of amounts permitted by state law).

empowered President Franklin D. Roosevelt to place an embargo on arms or munitions in the Chaco region of South America.<sup>79</sup> In implementing the statute, Roosevelt relied entirely on this grant of legislative power.<sup>80</sup> He did not identify any independent or plenary presidential power. Nothing in the briefs submitted by the Justice Department or by the private parties explored the availability of independent or inherent presidential power.<sup>81</sup> The Court only needed to decide that in the field of international affairs Congress could delegate with greater latitude to the President than it could in domestic affairs. The rest of the decision was dicta, entirely extraneous to the issue being litigated.<sup>82</sup>

Third, what did Marshall mean when he referred to the President as “sole organ”? His objective was to defend the authority of President John Adams to carry out an extradition treaty and to return to England an individual charged with murder. Article 27 of the Jay Treaty required that the United States and Great Britain deliver up to each other “all persons” charged with murder or forgery.<sup>83</sup> A House resolution described President Adams’s decision to turn the accused over to the British as “a dangerous interference of the Executive with Judicial decisions.”<sup>84</sup> The individual had been in the custody of U.S. District Judge Thomas Bee.<sup>85</sup>

Marshall took to the floor to say that there were no grounds to rebuke the President. In matters such as carrying out an extradition provision in a treaty, it was “a case for Executive and not Judicial decision.”<sup>86</sup> The President is charged by the Constitution “to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.”<sup>87</sup> Marshall emphasized that President Adams was not attempting to make foreign policy single-handedly. He was carrying out a policy made jointly by the President and the Senate (for treaties). Only after the policy had been formulated through the collective effort of the legislative and executive branches, either by treaty or statute, did the President emerge as the sole organ in *implementing* national policy.

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79. Act of May 28, 1934, ch. 365, 48 Stat. 811 (1934).

80. *Id.* at 1745.

81. Louis Fisher, *The “Sole Organ” Doctrine*, in STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS 14–15, available at <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf>.

82. Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRES. STUD. Q. 139, 144 (2007).

83. Act of Nov. 19, 1794 (Jay Treaty), U.S.–Gr. Brit., art. XXVII, 8 Stat. 116, 129.

84. 10 ANNALS OF CONG. 533 (1800).

85. *Id.* at 515; see *United States v. Robins*, 27 F. Cas. 825, 832 (D.C.S.C. 1799) (No. 16,175).

86. 10 ANNALS OF CONG. 611.

87. *Id.* at 613.

Fourth, in his capacity as Chief Justice, Marshall held firm to the position that the making of foreign policy and national-security policy is jointly exercised by the executive and legislative branches, not by a unilateral or exclusive presidential action. With the war power, for example, Marshall looked solely to Congress—not the President—for the authority to take the country to war. He had no difficulty in identifying the branch that possessed that power: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”<sup>88</sup> In an 1804 case, Marshall ruled that when a presidential proclamation issued in time of war conflicts with a statute enacted by Congress, the statute prevails.<sup>89</sup>

### B. Nazi Saboteur Case

When President Bush, on November 13, 2001, issued a military order authorizing the creation of military tribunals to try suspected 9/11 terrorists, the Administration relied heavily on a 1942 decision by the Supreme Court, *Ex parte Quirin*.<sup>90</sup> Eight German saboteurs traveled to the United States in two submarines, four landing at Amagansett, Long Island, and the other four landing near Jacksonville, Florida.<sup>91</sup> George Dasch, who headed the first group, turned himself in to the Federal Bureau of Investigation and helped the government locate the other seven.<sup>92</sup> Within a matter of two weeks, all of the intended saboteurs had been apprehended.<sup>93</sup>

Initially, the Franklin D. Roosevelt Administration did not plan to try the eight men by military tribunal. The FBI told Dasch that if he pled guilty in civil court, he would likely receive a presidential pardon.<sup>94</sup> Two events disrupted that plan. First, Dasch decided that if he were taken to civil court he would explain that he had turned himself in and helped the government locate his colleagues. The Administration could not allow that. The country (and Germany) had the impression that the Executive Branch possessed extraordinary competence to locate and apprehend terrorists who

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88. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801). There is additional recognition of Congress’s authority over decisions of war in other early Supreme Court decisions. *See, e.g.*, *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39–46 (1800) (considering the “legislative will” when discussing whether France is a declared “enemy” of the United States).

89. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

90. Louis Fisher, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW* 159–62 (2003) [hereinafter *NAZI SABOTEURS ON TRIAL*]; *Ex parte Quirin*, 317 U.S. 1, 1 (1942).

91. *NAZI SABOTEURS ON TRIAL*, *supra* note 90, at 25–26.

92. *Id.* at 32–38.

93. *Id.* at 25–42.

94. *Id.* at 46.

entered the country, even by submarine.<sup>95</sup> The second reason is that the Justice Department and the Judge Advocate General could not discover in federal statutes a legal basis for punishing the eight Germans other than a prison sentence of perhaps two or three years. President Roosevelt wanted them executed. Creating a military tribunal permitted him to impose harsher penalties.<sup>96</sup>

President Roosevelt issued a proclamation and a military order establishing the tribunal, selecting the co-prosecutors (Attorney General Francis Biddle and Judge Advocate General Myron Cramer), the defense counsel (military officers), and members of the tribunal (seven generals).<sup>97</sup> All participants, of course, were subordinate to the President. After the tribunal completed its deliberations, the trial record would be returned to President Roosevelt for final decision as to the judgment or sentence. Were any U.S. citizen subjected to that closed and circular process in a foreign land, legitimate condemnations would be directed against that country. Few rules guided the tribunal in advance. Most of the rules emerged in response to various questions raised by the prosecution and the defense.<sup>98</sup>

Toward the end of the tribunal proceedings, the defense attorneys decided to seek a habeas petition from the civil courts. The Supreme Court, agreeing to hear the case before there had been any action in the lower courts, selected July 29, 1942 to begin oral argument.<sup>99</sup> The defense managed to get to district court on July 28, but was turned down that evening at 8 p.m.<sup>100</sup> The Supreme Court was poorly prepared to hear the case. The Court had scant guidance from the lower courts. The briefs submitted to the Court were dated the same day that oral argument began, and the Justices had little familiarity or experience with issues involving military law.<sup>101</sup> To cope with its lack of preparation, the Court allowed oral argument to continue for nine hours over a two-day period.<sup>102</sup>

One of the first issues for the Court was whether it had jurisdiction. How could it take the case from the district court without first waiting for judgment from the appellate court, the D.C. Circuit Court of Appeals? Defense counsel tried to provide an answer but finally admitted it lacked time to prepare, and asked to continue oral argument while it delivered

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95. *Id.*

96. *Id.* at 47.

97. Appointment of a Military Commission, 7 Fed. Reg. 5101, 5103 (July 7, 1942).

98. NAZI SABOTEURS ON TRIAL, *supra* note 90, at 56–59.

99. *Id.* at 64–68.

100. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942), *aff'd*, 317 U.S. 1 (1942).

101. NAZI SABOTEURS ON TRIAL, *supra* note 90, at 88.

102. *Id.* at 95–108.

papers to the D.C. Circuit. The Court agreed to that procedure.<sup>103</sup> At the end of the nine-hour period, the Court recessed and was prepared to hand down a decision. The petition for certiorari was filed with the Court at 11:59 a.m. on July 31.<sup>104</sup> One minute later the Court granted certiorari, and at the same time released its decision.<sup>105</sup> But the decision did not contain legal reasoning. It consisted of a short per curiam opinion that upheld the jurisdiction of the military tribunal. The Court explained that it was acting “in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.”<sup>106</sup>

The military tribunal completed its work, found all eight defendants guilty, and recommended the death sentence for each.<sup>107</sup> President Roosevelt upheld the execution of six but gave prison sentences to two: George Dasch and Peter Burger, who helped the government locate their colleagues.<sup>108</sup> The six were electrocuted on August 8.<sup>109</sup> In the midst of these developments Chief Justice Harlan Fiske Stone, from his summer home in New Hampshire, sat down to draft an opinion complete with legal justifications. He wrote to Justice Felix Frankfurter on September 10 that he found it “very difficult” to support the Administration’s construction of the Articles of War that provide statutory guidance for military law. He added that it “seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated.”<sup>110</sup> Stone feared that when documents were released after the war, including the trial transcript, Dasch and Burger could successfully argue that the Roosevelt Administration violated the Articles of War, which “would not place the present Court in a very happy light.”<sup>111</sup> Even without the release of those documents, several Justices concluded that the Administration had violated several Articles of War.<sup>112</sup>

Stone managed to get the Court to agree unanimously to an opinion, made public on October 29, three months after issuing the per curiam

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103. *Id.* at 97.

104. *Id.* at 108.

105. *Id.*

106. *Ex parte Quirin*, 317 U.S. 1, 2 (1942).

107. NAZI SABOTEURS ON TRIAL, *supra* note 90, at 77.

108. *Id.* at 77–79.

109. *Id.* at 78–79.

110. *Id.* at 110.

111. *Id.* at 110–11.

112. *Id.* at 112–13, 115, 117.

opinion.<sup>113</sup> Justice Frankfurter asked Frederick Bernays Wiener, an expert on military law, to evaluate the opinion.<sup>114</sup> In a series of three lengthy letters, Wiener found grave weaknesses in the Court's decision, concluding that the deficiencies flowed "in large measure" from the administration's disregard for "almost every precedent in the books" when it established the military tribunal.<sup>115</sup> These letters from Wiener appeared to have a deep impact on Frankfurter. In 1953, when the Court was considering whether to sit in summer session to hear the espionage case of Julius and Ethel Rosenberg, some of the Justices asked whether they could hear the case, issue a short per curiam opinion, and release a full decision later explaining the legal justification.<sup>116</sup> Justice Robert Jackson opposed this procedure, as did Frankfurter, who described *Quirin* as "not a happy precedent."<sup>117</sup> During a 1962 interview, Justice William O. Douglas also criticized the procedures followed by the Court in the Nazi saboteur case.<sup>118</sup>

Not only did the Court regret its opinion in *Quirin*, but the Roosevelt Administration acknowledged that its procedures in 1942 were not worth repeating. Two years later, Nazi Germany sent two more agents to the United States by submarine, this time for the purpose of espionage, not sabotage.<sup>119</sup> Both men were quickly apprehended and the Administration was prepared to repeat its experiment with a military tribunal.<sup>120</sup> Biddle and Cramer would again serve as co-prosecutors before a military tribunal sitting on the fifth floor of the Justice Department in Washington, D.C.<sup>121</sup> This time, however, Secretary of War Henry Stimson strongly opposed the decision and advised Roosevelt to have the case taken out of his hands and transferred to a military commission appointed by the Army commander in Governors Island, New York, subject to existing Articles of War.<sup>122</sup> The trial record would not go to the President.<sup>123</sup> Instead, review would be processed by professionals within the Judge Advocate General's office.<sup>124</sup> Roosevelt agreed to this alternative.<sup>125</sup>

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113. *Ex parte Quirin*, 317 U.S. 1, 1 (1942).

114. NAZI SABOTEURS ON TRIAL, *supra* note 90, at 129.

115. *Id.*

116. *Id.* at 134.

117. *Id.*

118. *Id.*

119. *Id.* at 138–39.

120. *Id.* at 139–40.

121. *Id.* at 140.

122. *Id.* at 140–42.

123. *Id.* at 143.

124. *Id.* at 140–43.

125. *Id.*

Scholars have been highly critical of the Court's decision in *Ex parte Quirin*. In his book on Chief Justice Stone, Alpheus Thomas Mason warned that the judiciary during World War II "was in danger of becoming part of an executive juggernaut."<sup>126</sup> Michal Belknap said that Stone went "to such lengths to justify Roosevelt's proclamation" that he "preserv[ed] the form of judicial review [while] gutt[ing] it of substance."<sup>127</sup> David Danelski called the full opinion in *Quirin* "a rush to judgment, an agonizing effort to justify a *fait accompli*."<sup>128</sup> He advised the Court to "be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive."<sup>129</sup>

### C. The State Secrets Privilege

In 1953, in *United States v. Reynolds*, the Supreme Court for the first time recognized what has come to be known as the "state secrets privilege."<sup>130</sup> Under this doctrine, if private citizens sue the Executive Branch for negligence or abuse of power, an administration official can prepare a declaration or affidavit advising the court that litigation would risk the disclosure of documents damaging to national security or foreign policy. If the court agrees with that assertion, the litigation stops in its tracks. The private parties are unable to proceed to discovery and gain access to evidence. In *Reynolds*, the Court accepted the word of an executive official without ever looking at the disputed documents.

The *Reynolds* case began in 1948 when a B-29 exploded over Waycross, Georgia, killing five of eight military crew and four of five civilian engineers who were on board helping with confidential equipment.<sup>131</sup> Three widows of the civilian engineers sued under the Federal Tort Claims Act of 1946, seeking access to the official accident report.<sup>132</sup> In district court, the trial judge advised the Administration that if it did not deliver the report to him to be read in his chambers, it would lose the case.<sup>133</sup> The Administration appealed to the Third Circuit, but the

126. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 665–66 (1956).

127. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *MIL. L. REV.* 59, 83 (1980).

128. David J. Danelski, *The Saboteurs' Case*, 1996 *J. SUP. CT. HIST.* 61, 61 (1996).

129. *Id.* at 80.

130. See *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (articulating the formation of the privilege).

131. LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 1–3 (2006) [hereinafter *IN THE NAME OF NATIONAL SECURITY*].

132. *Reynolds*, 345 U.S. at 3–4.

133. *IN THE NAME OF NATIONAL SECURITY*, *supra* note 131, at 51–57; see *Brauner v. United States*, 10 F.R.D. 468, 471–72 (D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d

appellate court took the same position: if the government failed to surrender the document for *in camera* inspection, it would lose the case.<sup>134</sup>

The Administration appealed to the Supreme Court, this time strongly urging the state-secrets privilege.<sup>135</sup> Without looking at the accident report, the Court (divided 6 to 3) held in favor of the Executive Branch.<sup>136</sup> The Court decided that the statement by Secretary of the Air Force Thomas K. Finletter, implying the existence of state secrets in the accident report, presented a privilege “well established in the law of evidence.”<sup>137</sup> The Court cited various authorities on evidence, including the leading treatise by John Henry Wigmore,<sup>138</sup> but neglected to point out that Wigmore concluded that the institution authorized to decide what evidence to submit in a state secrets case is the judiciary, not the executive.<sup>139</sup>

The Court provided vague and confusing guidelines for the privilege:

[The state secrets privilege] belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.<sup>140</sup>

There is little reason to believe that Secretary Finletter (or the head of any executive department) would personally read and analyze a lengthy accident report. What did “personal consideration” mean? Being briefed by a subordinate who might have examined the report? The Court described this level of judicial supervision: “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>141</sup> The trial judge and the Third Circuit decided that judicial supervision meant looking at the disputed document *in camera*.<sup>142</sup> How else can a court “determine whether the circumstances are appropriate for the claim of

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Cir. 1951), *rev'd*, 345 U.S. 1 (1953) (concluding that no privilege protected the report, and the report must be allowed to be discovered).

134. *Reynolds v. United States*, 192 F.2d 987, 997–98 (3d Cir. 1951).

135. *IN THE NAME OF NATIONAL SECURITY*, *supra* note 131, at 96–99.

136. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

137. *Id.* at 6–7.

138. *Id.* at 7 n.11.

139. *IN THE NAME OF NATIONAL SECURITY*, *supra* note 131, at 48–49.

140. *Reynolds*, 345 U.S. at 7–8 (footnotes omitted).

141. *Id.* at 8 (footnotes omitted).

142. *Id.* at 4–5.

privilege”? When a judge examines a document in his or her chambers, did that constitute “disclosure” to the Supreme Court? If so, how can a court be assured the head of a department conducted a “personal consideration” of the claim? Without reviewing the document, a court would necessarily be at the mercy of a claim or assertion by an executive official, removing any element of judicial independence and any pretense of an adversarial process. An executive official would merely assert a claim to be accepted by the court, which would never know whether the claim is true or false.

The Supreme Court in *Reynolds* claimed that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”<sup>143</sup> Unwilling to look at the accident report, the Court necessarily abdicated. It argued that under some circumstances there would be no opportunity for *in camera* inspection: “[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”<sup>144</sup> Why would *in camera* inspection jeopardize national security?

Judith Loether, daughter of one of the civilian engineers who died on the B-29, discovered in February 2000 that the accident report had been declassified in the 1990s and was available for purchase.<sup>145</sup> To her surprise, the report contained no state secrets.<sup>146</sup> Instead, it concluded there had been government negligence.<sup>147</sup> The Air Force failed “to comply with two technical orders that mandated changes to the exhaust manifold assemblies to eliminate a fire hazard. The orders required the installation of heat shields to avoid overheating.”<sup>148</sup> Without that installation, the aircraft was not considered “to have been safe for flight.”<sup>149</sup>

The three families returned to court on a *coram nobis* (fraud against the court), contending that the Executive Branch had deceived the judiciary by falsely claiming the existence of state secrets in the accident report. They lost at every level: an initial appeal to the Supreme Court followed by defeats in district court and the Third Circuit in 2004 and 2005.<sup>150</sup> On May 1, 2006, the Supreme Court refused to take the case.<sup>151</sup>

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143. *Id.* at 9–10.

144. *Id.* at 10.

145. IN THE NAME OF NATIONAL SECURITY, *supra* note 131, at 166–67.

146. *Id.* at 167.

147. *Id.*

148. *Id.* at 178.

149. *Id.*

150. *Herring v. United States*, No. 03-CV-5500-LDD, 2004 WL 2040272 (E.D. Pa. Sept. 10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006). *See generally* IN THE NAME OF NATIONAL SECURITY, *supra* note 131, at 176–211 (recounting these proceedings).

151. *Herring v. United States*, 547 U.S. 1123, 1123 (2006).

Both before and after the terrorist attacks of 9/11, federal courts have handled many state secrets cases by adopting the standard of “deference” or “utmost deference” to Executive Branch claims, including cases involving NSA surveillance that violated the FISA statute and the extraordinary-rendition cases of Maher Arar and Khalid El-Masri.<sup>152</sup> The effort of private citizens to uncover illegal and unconstitutional actions by the Executive Branch “must give way,” courts have held, “to the national interest in preserving state secrets.”<sup>153</sup> No national interest is served by taking at face value what the Executive Branch says in court, especially when the historical record reveals deceptive and false claims by various administrations.

#### CONCLUSION

In a famous concurrence in 1927, Justice Louis Brandeis stated that the framers who won independence from England “believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.”<sup>154</sup> The purpose of government was to inspire independent thought and encourage public participation. He counseled that political order could not “be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government.”<sup>155</sup> Free citizens, lawmakers, and federal judges cannot automatically defer to assertions and claims by those in authority, including the President and executive officials. To behave in that fashion makes impossible the system of checks and balances that safeguards constitutional government and individual freedoms.

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152. See THE CONSTITUTION AND 9/11, *supra* note 1, at 285–360 (discussing NSA surveillance and extraordinary rendition).

153. El-Masri v. Tenet, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006).

154. Whitney v. California, 274 U.S. 357, 375 (1926) (Brandeis, J., concurring).

155. *Id.*